DEFENDERS OF WILDLIFE

IBLA 74-245 Decided March 25, 1975

Appeal from decision of the Safford Arizona District Office, Bureau of Land Management, rejecting a grazing lease application.

Reversed and Remanded.

1. Grazing Leases: Applications: Generally -- Regulations

> The regulations pertaining to section 15 grazing leases provide that a corporation is a qualified applicant for a lease if it is a corporation whose controlling interest is vested in persons who are engaged in the livestock business. 43 CFR 4121.1-1(b). Where the corporate applicant itself is engaged in a livestock business such a showing is sufficient for the corporation to meet this requirement without the need for those holding a controlling interest in the corporation to make an additional showing that they are engaged in a livestock operation in their individual capacities.

APPEARANCES: Putnam Livermore, Esq., Chickering and Gregory, Attorneys at Law, San Francisco, California, for appellants; Fritz L. Goreham, Office of the Solicitor, Department of the Interior, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Defenders of Wildlife has appealed from a decision of the Safford Arizona District Office, Bureau of Land Management, dated February 26, 1974, which rejected its grazing lease application.

The application was filed pursuant to Section 15 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1275, as amended, 43 U.S.C. § 315m), which vests discretionary authority in the Secretary of the Interior to lease for grazing purposes vacant, unappropriated,

and unreserved public lands in the continental United States, exclusive of Alaska, which are not within established grazing districts.

The record shows that Defenders of Wildlife first leased the subject national resource lands in 1972 through a series of assignments from the then existing lessees after they had acquired the preference right lands from those lessees. When the assigned leases expired November 1, 1973, Defenders filed an application for renewal. The application was rejected in its entirety on the basis that Defenders of Wildlife is not a qualified applicant for a grazing lease as provided in 43 CFR 4121.1-1(a)(c).

The regulation specifies the minimum qualification requirements for the awards of grazing leases as follows:

> An applicant for a grazing lease is qualified if:
>
> (a) He is a person engaged in the livestock business, has a need for the grazing use of the land, and is a citizen of the United States or;
>
> (b) It is a group or association authorized to conduct business under the laws of the State in which the grazing privileges sought are to be exercised, all members of which are qualified under paragraph (a) of this section, provided that the agreement or articles of association under which the association has been formed are approved by the State Director, or;
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> (c) It is a corporation, the controlling interest in which is vested in persons qualified under paragraph (a) of this section and which is authorized to do business under the laws of the State in which grazing privileges sought are to be exercised: Provided, That the articles of incorporation have been approved by the Authorized Officer.

A proposed decision was issued by the Safford District Manager, November 29, 1973, in which it was pointed out, among other things, that Defenders of Wildlife did not meet these minimum requirements in that the controlling interest in the corporation is not vested in persons engaged in the livestock business. Defenders protested the proposed decision stating that it was a corporate entity engaged in the livestock business for profit as part of its investment portfolio. The record establishes that Defenders is engaged in the livestock business. After Defenders declined to submit further clarifying information as to the controlling interest of the corporation, the District Manager issued his final decision rejecting the grazing lease application for the reason that Defenders had not shown it was a qualified applicant.

Defenders argues in its appeal that the District Manager has erroneously interpreted the regulation in question. Defenders maintains that it need show no more than that the corporation is engaged in the livestock business through the ownership and management of its livestock operation on patented land in Pinal County, Arizona, and on federal and state leased land. Defenders submits that by virtue of their controlling interest, the persons in which said interest is vested are engaged in the livestock business within the meaning of the governing regulation.

Defenders of Wildlife argues that the plain meaning of the regulation does not require its officers and directors to be engaged in the livestock business in their individual capacities. It maintains that this interpretation is supported by the fact that the BLM has approved other applications for grazing leases in other grazing districts by corporations whose controlling persons are no more fully engaged in the livestock business than they are. 1/

The Field Solicitor has responded on behalf of the Bureau that Defenders does not meet the regulatory requirement. It is the Bureau's position that the regulation is valid and its plain meaning is subject only to the interpretation it has been given by the District Manager in this case.

Based upon our review of the record in this case, we find the District Manager's interpretation of the requirements for a qualified applicant presents a harsh and unreasonable result and is unwarranted.

The determination appealed from, if adhered to, would cause serious problems not only for a nonprofit corporation such as appellant, but also for ordinary livestock business corporations. For example, a formerly family or individually operated ranch could become disqualified upon incorporation. Or a group of local residents, who were not ranchers, would be found disqualified if they formed a corporation to run a ranch through a manager.

In this instance, the regulation in question, 43 CFR 4121.1-1, specifies the current requirements for a qualified grazing lease applicant. It is clear that an individual applicant must be engaged in the livestock business, have a need for the grazing use of the land, and be a citizen of the United States under 4121.1-1(a). It

1/ Appellant has submitted affidavits and exhibits as to its investigations and correspondence with other Bureau of Land Management District Offices as to their treatment of similar grazing applications and their administration of the pertinent section of the grazing regulations.

is likewise clear that the qualifying provisions for corporations in 4121.1-1(c) appear to require that a corporation's controlling interest be vested in persons no less qualified than an individual applicant under paragraph (a).

There is no question that the controlling interest in a corporation must be held by citizens of the United States. The controversy, however, develops as to whether the corporation's engaging in livestock operations and showing a need for the grazing use of the land is sufficient to qualify those holding a controlling interest under paragraph (c) to the extent of being engaged in the livestock business and having a need for the grazing use of the land. We hold that it does.

It is our view that the District Manager's requirement that the controlling interests also provide evidence of their individual livestock activity is an unfounded construction of 4121.1-1(c), divorced from any cogent reason or history, and inconsistent with Bureau practice and interpretation in other districts. In our examination of the history of the development of the structural changes of this section of the regulation we have found nothing to indicate that such a limited and restrictive requirement was the intended result for corporate grazing lease applicants. In fact there is evidence to the contrary.

The amendments which resulted in the current structure of the regulation have been in effect since publication in the Federal Register, 33 F.R. 11516, August 13, 1968. The pertinent changes dealing with the applicant's qualifications were instituted for uniformity, i.e., to conform the section 15 grazing lease application procedures with procedures for awards of section 3 grazing licenses or permits inside grazing districts found in 43 CFR 4111.1-1. 2/ The section 3 regulation was promulgated in its current format in 1966. 31 F.R. 12100, September 16, 1966. As the Board has recently held, we may look to the section 3 requirement for help in determining the meaning of similar section 15 requirements. Ralph E. Holan, 18 IBLA 432 (1975).

The prior section 4111.1-1 could not have been misread to require the controlling interest of corporate applicants to be engaged in a

2/ A Bureau of Land Management memorandum of June 16, 1965, discussing the proposed revisions in 43 CFR 4120 pointed out: The proposed revision is for the purpose of providing clarity, improving syntax, up-dating and closer conformance of grazing regulations for outside districts with those for inside grazing districts (43 CFR 4110).

livestock business other than that of the corporation. 3/ That regulation required a grazing applicant, whether individual or a corporation, to make a showing of engagement in livestock activity. However, the regulation required only the additional showing as to citizenship for those holding the controlling interest in the corporation. There was no additional reference to a requirement for their individual engagement in the livestock business.

As noted above, the § 15 regulation is almost identical with the § 3 regulation. In proposing the amendment to the latter, which was adopted as the current regulation, the Acting Director, Bureau of Land Management, stated in a memorandum to the Secretary dated May 6, 1966:

> Amendments are proposed to the Grazing Regulations for the Public Lands which will recognize groups, associations or corporations as qualified applicants where controlling interest may be vested in either the individual members or the group, association or corporation. The current regulations require that the controlling interest in such associations must be vested in persons who would be qualified as individual applicants. These changes will permit such associations as those formed under the Farmers Home Administration assistance program to be qualified as applicants.

This indicates that the regulation was intended to lessen the restrictions on corporate applicants, not increase them.

Neither the form for a § 3 permit, Form 4115-4, nor a § 15 lease, Form 4120-1, is devised to elicit such information, that is, neither

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3/ It read: "Qualifications.

An applicant for a grazing license or permit is qualified if engaged in the livestock business and:

(a) Is a citizen of the United States, or

(b) Has on file before a court of competent jurisdiction a valid declaration of intention to become a citizen or a valid petition for naturalization, or

(c) Is a group, association, or corporation authorized to conduct business under the laws of the State in which the grazing privileges sought are to be exercised, and the controlling interest in which is vested in persons who would be qualified as individual applicants under paragraphs (a) or (b) of this section." 43 CFR 4111.1-1 (1966 Rev.)

asks whether the controlling interest in a corporate applicant is held by a person or persons engaged in the livestock business.

The BLM manual evidences the same lack of concern. The § 3 provision, BLM Manual 4111.1.11, makes no particular reference to corporate applicants. The § 15 comments say only:

> A. Associations or Corporations. In the case of an association or corporation, it must be authorized to conduct business under the laws of the state in which the grazing privileges sought are to be exercised, and the articles of association or incorporation must be approved by the appropriate Bureau officer. Review and approval of articles will be by formal correspondence.

Again there is no instruction directing that an inquiry be made into whether one holding a controlling interest in a corporation (or association) is himself engaged in the livestock business.

Whether due to an oversight in draftsmanship or an omission in the transition of the structural changes in the regulations, there now exists an ambiguity in this area of corporate qualifications.

We note that the literal application of another of the requirements of subparagraph (a) to those holding a controlling interest in the corporation is again anomalous. Subparagraph (a) also provides that an applicant demonstrate that it "has a need for grazing use of the land." Literally this would require that not only would the corporate applicant have to show such a need, but that the persons holding the controlling interest in it would also have to, independent of the corporate need. There can be no rational explanation for such a double qualification. Indeed if the controlling interest were so qualified, there would be little, or no need to ask for a lease for the corporation. Indeed there would appear to be a conflict if the controlling interest needed the land for his own grazing use independent of the corporate need.

Thus the regulation is inherently ambiguous and uncertain in its direction. In such circumstances we may look to the intent of the regulation to define its meaning.

There is nothing in the records of the Department to show that the intent was to increase or alter the Department's past requirements for qualifications of corporate grazing applicants by the amendments in 1966 or 1968. No publications or explanations of the changed regulation have been brought to our attention indicating that such changes were intended. Nor can we find any instance where the Department has ever construed either the section 3 or section 15 qualifications in this restrictive manner before.

Therefore, both the sensible interpretation of the regulation and its apparent contemporaneous application by other Bureau district offices must override the Safford District Manager's restrictive approach to the Defenders of Wildlife application in this case. Thus, a corporation is not disqualified merely because the controlling interest does not maintain a separate grazing operation.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Safford District Manager rejecting appellants' grazing lease application is reversed and the case is remanded to the District Office for action consistent herewith.

Martin Ritvo
Administrative Judge

I concur:

Joan B. Thompson
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN DISSENTING:

I believe that the main opinion reaches a result contrary to the plain words of the regulation. The rationale offered in support of the construction given rests upon a finding that (1) the regulation, literally construed, "presents a harsh and unreasonable result;" (2) what the prior regulation provided; (3) resort to the regulatory history; and (4) lack of concern in enforcing the plain words of the regulations.

It is an elementary rule of regulatory construction that effect must be given if possible, to every word, clause and sentence of a regulation. See Ernest Smith, 4 IBLA 192, 78 I.D. 368, 370 (1971).

The regulations in issue read as follows:

§ 4121.1-1 Minimum qualification requirements.

> An applicant for a grazing lease is qualified if:
> (a) He is a person engaged in the livestock business, has a need for the grazing use of the land, and is a citizen of the United States or;
> (b) It is a group or association authorized to conduct business under the laws of the State in which the grazing privileges sought are to be exercised, all members of which are qualified under paragraph (a) of this section, provided that the agreement or articles of association under which the association has been formed are approved by the State Director, or;
> (c) It is a corporation, the controlling interest in which is vested in persons qualified under paragraph (a) of this section and which is authorized to do business under the laws of the State in which grazing privileges sought are to be exercised: Provided, that the articles of incorporation have been approved by the Authorized Officer.

To give these regulations the interpretation placed upon them by the main opinion necessarily involves retaining 4121.1-1(a) in toto, as applied to an individual applicant. But when subparagraph (a) is incorporated by reference into subparagraph (c), subparagraph

(a) is amended by deleting therefrom "he is a person engaged in the livestock business" - a most anomalous treatment.

Although the regulation, literally construed, may have harsh results in some circumstances, it is not entirely devoid of rationality. It could have been designed to exclude from obtaining interests in grazing leases, those persons who formed a grazing corporation as a tax shelter, and thus to minimizing absentee ownership, divorced from the livestock business, an of interests in grazing leases on public lands. For example the owner of a public relations firm in the East could own all the stock in a corporation engaged in livestock operations, held as a tax shelter. He would be thwarted in his use of sec. 15 grazing leases under the literal terms of the regulation. The legislative history of the Taylor Grazing Act is replete with references of the Congressional desire "to stabilize the livestock industry dependent upon the public range." Some measure of stability would be afforded to sec. 15 leaseholders by limiting the availability of sec. 15 lands to persons engaged in the livestock business, and to associations and corporations who controlling interests were possessed by persons in the livestock business.

It is noteworthy that a prior regulation made explicit that a corporation applicant for a sec. 15 lease need only show that it was authorized to do business in the particular state in which the lands are situated and that the controlling interest was held by citizens or persons who had filed their declaration of intention to become citizens. That regulation, 43 CFR 4122.1-1 (1968 ed.) read as follows:

> An applicant for a grazing lease is qualified if the applicant
> (a) is a citizen of the United States or;
> (b) Has filed a declaration of intention to become a citizen: Provided, That an applicant who has filed such declaration but has not filed a petition for naturalization before a court of competent jurisdiction within seven years from the date of filing the declaration or, having filed such petition, has failed to attain citizenship within a reasonable time thereafter and is unable to show any satisfactory reason for such failure, shall be disqualified to receive a grazing lease or any renewal of an existing lease until he has actually attained citizenship, or
> (c) Is a group, association, or corporation which is authorized to conduct business

> under the laws of the State in which the lands applied for are located and the controlling interest in which is vested in a citizen or citizens or persons who would be qualified as individual applicants under paragraphs (a) and (b) of this section.

There is nothing in the regulatory history of the current regulations to impel a departure from their clear and unambiguous terms. Whether the current regulations, as literally construed, are based upon sage considerations is beyond the area of concern for this Board.

Although the main opinion adverts to a virtually identical regulation, 43 CFR 4111.1-1, pertaining to applicants for grazing privileges under sec. 3 of the Taylor Grazing Act, 43 U.S.C. § 315(b) (1970), the main opinion is devoid of any evidence or precedent relating to this section which would impel an interpretation other than the clear and literal language of 4121.1-1(b) and of 43 CFR 4111.1-1.

I am aware of Justice Frankfurter's famous dictum in his dissenting opinion in United States v. Monia, 317 U.S. 424, 431 (1943). He said:

> * * * The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification.

I respectfully submit that no convincing showing has been made to alter the literal meaning of 43 CFR 4121.1-1. Moreover, in changing the 1968 regulation, the Department presumably intended that the new regulation should govern. The main opinion casts aside that amendment.

The main opinion stresses that the BLM forms for sec. 3 and sec. 15 applications are not designed to elicit the information necessary to effectuate the regulation as literally read; the BLM Manual evinces the same lack of concern.

While it is true that contemporaneous and long-standing interpretations are sometimes given extra authoritative weight, Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827), that doctrine has applicability only where a law (or regulation) is ambiguous. Id. But that doctrine is tempered by the view that negative action is not tantamount to a positive interpretation.

In Baltimore & Ohio R. Co. v. Jackson, 353 U.S. 325, 330-31, 1957), the Court stated:

> It is contended that, since the Commission has for over 60 years considered maintenance-of-way vehicles not subject to the Acts, this consistent administrative interpretation is persuasive evidence that the Congress never intended to include them within its coverage. It is true that long administrative practice is entitled to weight, Davis v. Manry, 266 U.S. 401, 405 (1925), but here there has been no expressed administrative determination of the problem. We believe petitioner overspeaks in elevating negative action to positive administrative decision. In our view the failure of the Commission to act is not a binding administrative interpretation that Congress did not intend these cars to come within the purview of the Act. See Shields v. Atlantic Coast Line R. Co., 350 U.S. 318, 321-322 (1956). [Footnote omitted.]

I would affirm the decision below on the basis of the present regulation. If the literal meaning of the regulation does not comport with Departmental policy, the regulation should be amended accordingly.

Frederick Fishman
Administrative Judge